No. 9685

18

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director of the United States Immigration and Naturalization Service, Los Angeles, California District No. 20,

Appellant,

vs.

WONG CHOON OCK,

Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

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Opening Statement.

The "Opening Statement" appearing on pages 1 and 2 of appellant's opening brief is substantially correct. The "Facts of the Case" on page 3 of the same brief is a correct statement so far as it goes. However, there are a great many additional facts which appear in the record and which will hereafter be called to the attention of the court in order that the grounds for the decision of the District Court may be thoroughly understood and appreciated.

Question at Issue.

Appellant states at page 4 of his opening brief that while there are five assignments of error, there is but one issue before this Honorable Court, to-wit:

> "Was the applicant accorded a fair hearing? Or specifically: Did denial of the representation by counsel at the Immigration hearing render the hearing unfair?"

The determination of appellant to limit the scope of this review to that single question is further borne out by the fact that commencing at page 12 of appellant's opening brief and continuing through to the conclusion, the brief is devoted entirely to the single proposition that a Chinese alien seeking admission to the United States is not entitled to be represented by counsel at his hearing before the Immigration Department. We do not concede the correctness of this proposition, but we will not devote space in this brief to lengthy reply for the reason that we deem the issue so presented to be in no sense determinative of this appeal.

The Memorandum Decision of the District Court [R. 9] partially quoted in appellant's brief at page 4, is set out at length herein (with numbers added in italics for the sake of clarity):

"(Title of District Court and Cause.)

MEMORANDUM OF DECISION.

Cosgrave, District Judge.

"In this matter the Board of Review on Appeal of the Immigration Department in Washington, *(1)* being dissatisfied with the sufficiency of the evidence supporting the findings of the Special Board of Inquiry, sent the case back with instructions to take further expert testimony. *(2)* Pursuant to such order Dr. Earl C. Kading was called. *(3)* No notice whatever was given to the applicant of the production of Dr. Kading as a witness and *(4)* no opportunity afforded for cross-examination of this expert on behalf of the applicant, *(5)* nor was applicant given any opportunity to produce witnesses to controvert the testimony of Dr. Kading.

"*(6)* Such proceeding is manifestly unfair, particularly since *(7)* in reaching its decision the Immigration Department has disregarded the competent and uncontradicted testimony of eye-witnesses as to the date of nativity and parentage of applicant.

"The petition for writ of habeas corpus is granted, and the petitioner is discharged from the custody of the Immigration authorities.

"July 1, 1940.

"(Endorsed): Filed Jul. 1, 1940."

From the foregoing it appears that there are no less than seven reasons why the District Court reached the decision it did, notwithstanding the statement on page 4 of appellant's opening brief that "the court regarded the hearing in this case to be unfair *solely* because the applicant was not permitted to be represented by counsel before the Board of Special Inquiry." (Italics ours.)

It is apparent that nowhere in the decision of the District Court is any emphasis placed on the fact that appellee was not permitted to be represented by counsel. The only part of the decision which even suggests this idea is number 4 which states: "No opportunity (was) afforded for cross-examination of this expert on behalf of applicant." This is a very different thing from saying that applicant was not permitted to be represented by counsel. It will also be noted that denial of counsel to applicant is not alleged as a ground of unfairness in the Petition for Writ of Habeas Corpus. [R. 1.]

Rule 12 of the Immigration Rules quoted at page 13 of appellant's opening brief permits the applicant to have one friend or relative present after the preliminary part of the hearing has been completed. If we concede that the applicant (a nine year old boy) might not have been qualified to cross-examine an expert witness like Dr. Kading, it is nevertheless quite possible that his friend or relative could have conducted such an examination. For example, it appears in the record [Tr. pp. 17 and 18] that applicant's father, Wong Quan, is not only an American citizen (this fact is expressly conceded by appellant at page 5 of his opening brief) but also that Wong Quan was born in San Francisco, and has lived his entire life in the state of California, speaks English fluently and served for twenty years as cook in the United States Navy. It thus appears that appellee's own father might very well have cross-examined the expert had an opportunity been afforded and that the District Court's reference to a denial of the right of cross-examination is by no means the same thing as saying that he was denied the right to counsel.

ARGUMENT.

A Correct Decision Will Not Be Disturbed on Appeal Because the Court Below Gave a Wrong or Insufficient Reason Therefor.

Even if one or more of the seven reasons set out in the opinion of the District Court were in the judgment of this Honorable Court wrong or insufficient, that fact alone would not justify the reversal of this judgment.

The Supreme Court of the United States has recently stated this rule in *Helvering v. Gowran,* 302 U. S. 238, 245, 82 L. Ed. 224:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 65 L. ed. 892, 41 S. Ct. 451; United States v. American R. Exp. Co., 265 U. S. 425, 68 L. ed. 1087, 44 S. Ct. 560; United States v. Holt State Bank, 270 U. S. 49, 56, 70 L. ed. 465, 469, 46 S. Ct. 197; Langnes v. Green, 282 U. S. 531, 75 L. ed. 520, 51 S. Ct. 243; Stelos Co. v. Hosiery Motor-Mend Corp., 295 U. S. 237, 239, 79 L. ed. 1414, 1416, 55 S. Ct. 746; cf. United States v. Williams, 278 U. S. 255, 73 L. ed. 314, 49 S. Ct. 97."

This case was followed and cited in a recent decision of the Circuit Court of Appeals for the Tenth Circuit, *North American Acc. Ins. Co. v. Tebbs,* 107 Fed. (2d) 853, 856. The same rule was applied by the United States Supreme Court in a habeas corpus case where the court says: "The judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petition." *Ex parte Royall,* 117 U. S. 241, 29 L. ed. 868. A similar rule was stated by this Honorable Court in *Commissioner v. Bryson,* 79 Fed. (2d) 397, 402.

The District Court Has Made Findings of Fact Which Are Amply Supported by the Evidence and Are Therefore Determinative of This Appeal.

The entire immigration record which has been filed in this court was likewise before the District Court at the time its proceedings were conducted. After considering all this evidence and being fully advised in the premises, the District Court made its order granting the petition for writ of habeas corpus and discharging applicant from custody [R. 10]. This is the order from which the present appeal is taken. In this order the District Court found that the allegations of the petition are true and that appellee was illegally restrained of his liberty and prevented from entering into the United States by the appellant herein. By reference to the Petition for Writ of Habeas Corpus [R. 1] it is seen that the District Court has found as a fact that Wong Choon Ock (appellee) is a citizen of the United States; that he was born in China and that he is the son of Wong Quan, whose United States citizenship is conceded by the Immigration Department. It is further found as a fact that when appellee applied for admission to the United States at San Pedro, California, on or about June 25, 1939; that competent witnesses testified to the fact of his birth and relationship to his father and mother and that there was no showing of any untruth in his testimony respecting his relationship and nativity, and other matters bearing directly on his claim of American citizenship. It is further found as a fact that the adverse ruling of the Immigration Department was based solely on the opinion evidence of certain doctors to the effect that the appearance and bone structure of appellee indicated that he was from one to three years older than

he and his parents testified, and that accordingly he could not be the natural son of the said parents. It is further found as a fact that the opinion evidence of these doctors upon which the decision of the Immigration Department was based was and is uncertain, indefinite and wholly insufficient to raise any conflict or to cause any discrepancy in the testimony as against the positive and direct testimony of eye-witnesses to the nativity of the appellee. It is further found as a fact that appellee was denied the right, by the Immigration Department, to present the testimony of three additional eye-witnesses as to his nativity and relationship to his father; said witnesses each being native born American citizens and older brothers of applicant and who were personally present at the time of his birth. It is further found that all of the foregoing acts on the part of the Immigration Department prevented applicant (appellee), from receiving a fair and impartial hearing of his application for admission to the United States.

Appellant has utterly failed to point out any respect in which the evidence fails to support these findings of the lower court.

With respect to the evidence offered in support of appellee at the immigration hearing, it appears from the record to have been of the very highest and most convincing character. Appellee, together with his father, mother and younger brother, all arrived on the same steamer, traveling as a family unit. They were bound for the

parent's home in Los Angeles, in which city the older brothers of appellee are established in business.

We can do no better with respect to this testimony than to quote from the official conclusions of the Board of Review of the Immigration Department sitting in Washington, and dated November 2, 1939 (Immigration Record 56007/819):

> "Wong Quan, the alleged father of the applicant, Chin Shee, his alleged mother, and Wong Choon Loy, an alleged brother of the applicant, all three of whom accompanied the applicant on his journey to the United States, have testified as witnesses in support of his claim.
>
> *"The testimony is completely harmonious, no discrepancy of any sort being alleged.* Moreover, while the Board of Special Inquiry at San Pedro appears not to have observed a resemblance between the applicant and his alleged parents, *a comparison of the photographs indicates a marked similarity between the applicant and his parents in the matter of a rather peculiar ear formation which might be regarded as a family characteristic or peculiarity."* (Italics ours.)

Seldom indeed is it, that the Board of Review of the Immigration Department uses such language as quoted above: "The testimony is completely harmonious, no discrepancy of any sort being alleged."

The convincing character of this testimony impressed not only the Board of Review, but also the District Court as will be noted from its Memorandum Opinion, *supra.*

When it was learned for the first time that appellee's age had been challenged, application was promptly made for leave to reopen the case and submit additional evidence to the Immigration Department specifically on the question of appellee's age. The letter of Warner H. Parker, attorney for applicant, dated December 1, 1939, addressed to the Commissioner of Immigration is part of record No. 56007/819. The proferred testimony was competent and bore specifically on the question at issue; however, the application was denied by the Immigration Department as shown by the letter dated December 12, 1939, from Edw. J. Shaughnessy, Deputy Commissioner to Warner H. Parker, in the same record. At about this same time the case was reopened by the Immigration Department on its own motion to receive the testimony of its own medical expert, Dr. Kading. This is the expert who is referred to in the Memorandum Opinion of the District Court and the unfairness of this "star-chamber" proceeding was one of the things that impressed the lower court unfavorably [R. 9].

In *Chin Quong Mew v. Tillinghast,* 30 Fed. (2d) 684, the Circuit Court of Appeals for the 1st Circuit says:

> "The applicant was not informed by the Board that such evidence would be received and considered and was given no opportunity to refute or explain it. It was undoubtedly used and given weight by the Board in reaching its conclusion. *Such conduct was highly prejudicial and rendered its decision unfair.*" (Italics ours.)

The Lower Court's Finding That the Medical Testimony Was Uncertain and Inconclusive Is Amply Supported by the Evidence.

It has already been pointed out that the lower court found as a fact that the opinion evidence of the doctors as to appellee's age was and is uncertain, indefinite and wholly insufficient to raise any conflict or to cause any discrepancy in the testimony as against the positive and direct testimony of eye-witnesses to the nativity of appellee.

Appellant in an attempt to discredit the age claim of applicant calls attention to a photograph in the record and at page 6 of his opening brief makes the statement: "* * * the photographs show the applicant to be *practically twice as tall as his alleged brother.*" (Italics ours.)

This same assertion was made by appellant in his argument to the District Court. The manifest error of the statement was pointed out to the court below and we in turn request this Honorable Court to examine the photographs in the record. By actual measurement of the photograph, Exhibit "E", the younger boy, Wong Choon Loy is eighty per cent (80%) as tall as applicant. (Not fifty per cent (50%) as appellant's brief indicates.) In fact, the difference in height, as indicated in the pictures is what would be expected remembering that applicant is a tall thin child while his younger brother is of a short robust build. It is this very circumstance (that appellee is tall for his age), which no doubt led the doctors to their erroneous conclusions.

The doctors were all at variance respecting their opinions as to appellee's age. Dr. Campbell's testimony at page 32 of the transcript is in part as follows:

> "269 Q. Have you any opinion you care to express regarding Dr. Graning's report? A. Dr. Graning expressed the opinion that the boy is between the age of eleven and thirteen and I disagree with him and say that *the true age is as the boy stated it thru the interpreter, ten years.*" (Italics ours.)

Applicant's mother, Chin King Nue, also testified [Tr. p. 5] that applicant was "age ten". It is obvious, of course, that both applicant and his mother were using the Chinese mode of reckoning, by which a baby is one year old at the moment of birth, and not the American method by which a child is said to be of a given age throughout the year following the completion of the number of years stated as his age. The testimony therefore indicates an age of nine years for the applicant.

Inasmuch as applicant's father and mother left San Francisco for China on July 17, 1929 [Immig. Rec. p. 17], and arrived in that country early in August of that year. appellee might have been as old as nine years and ten months at the time of his first examination by the doctors.

The flimsy character of this opinion evidence to overcome the positive and direct testimony of eye-witnesses was recognized by the Board of Review of the Immigration Department in its Memorandum Decision dated February 17, 1940, which reads in part as follows:

> "The private physician employed by those interested in the applicant's cause to furnish additional evidence appeared before the Board of Special Inquiry and stated that in his opinion the applicant was

approximately ten years old at the time of his examination. According to his asserted birth date, the applicant was at that time two or three months under nine years of age. In the circumstances of the case the alleged father's paternity would be possible if the applicant were a few months over nine years of age. It was, therefore, felt that the discrepancy between the age which would accord with the applicant's asserted birth date and the age of the applicant as estimated by the medical examiners should not be regarded as sufficient to warrant the dismissal of the appeal without consultation with the appropriate official of the Public Health Service in the central office of that Service in Washington."

Dr. E. C. Kading's report (Immigration Record) of his examination made November 22, 1939 (five months after applicant's arrival), gives his height as 59¾ inches and weight 76½ pounds.

"Pediatric Dietetics" by N. Thomas Saxl, published in 1937, the leading authority on the development of children, contains a height and weight table on page 436 in which the minimum weight shown for a height of 59 inches is 87 pounds. The average weight for this height would be 89 pounds. This applicant's weight is therefore 13 pounds less than the average for a 59 inch height and 11 pounds less than the lowest weight given for this height in Saxl's table. Dr. Kading described applicant as "a boy of light bony frame". The photographs of applicant which are in evidence show him to be thin and flat chested and extremely tall in relation to his weight. The table above quoted shows applicant's weight to be about the average for nine year old boys, although his height is well above the average. Like many other little

boys he has the misfortune of being too tall for his age and weight.

In addition to the external appearance of the applicant the doctors have considered X-ray pictures of some of his joints, this involves the science of Roentgenology and is based on the assumption that X-ray pictures will disclose the "bone age" or "skeletal age" of an individual and that his true chronological age can be deduced therefrom. So far as we have been able to find this type of evidence was most recently considered by a Court of Record in the following case. District Judge Brewster, sitting in the District Court for the District of Massachusetts, had for consideration a petition for a writ of habeas corpus where a Chinese applicant who was a foreign born son of a citizen had been denied admission by the Immigration Department. In this case, *Chin Ten Teung v. Ward,* 30 Fed. Supp. 670, the court says:

> "This son of a citizen is denied admission because a medical examiner, who examined him and X-ray pictures, testified that he was 20 to 21 years of age. The medical examiner was obliged to admit that he was not qualified to say whether his theories respecting skeletal development would hold in the case of one of the Chinese race. There was medical evidence before the Board to the effect that age could not be accurately determined by the degree of ossification. A doctor testified that 'The reason why I have this conclusion is due to the fact that every author that has done research work on the epiphyses will not state definitely that the epiphyses united at the definite time due to the fact that these epiphyses are affected by sunlight, fresh air, muscular exercise, diet, and

glandular disturbance; * * * They are not definite in their opinion and I think I can't truthfully say the exact age and there is no one who can say the exact age of any individual within three years. * * *'

"The Board of Review had before it abundant evidence to the same effect from reputable sources, and also further evidence that the Chinese are of a very different type from the Caucasian, and that among the Chinese there is great variation in the time of junction of the epiphyses with the main part of the various bones to which they belong.

"Over against the unsupported hypothesis of the medical examiner can be set the testimony of relatives who had entered the country in 1923, all of whom agreed that the father Chin Yoke Sing had, at that time, only one son. * * *

"At the risk of coming perilously close to the limits which define the jurisdiction of the Court to overrule administrative action, I feel that this is a case where the action of the administrative authorities, both here and in Washington, in wholly disregarding important and reliable evidence, amounted to an unfair hearing; moreover, I think it may very well be held that the conclusion that the claimant was born prior to August, 1923, was without substantial evidence to support it.

"I cannot escape the conviction that, if a son of a citizen is to be denied admission to the United States, his exclusion should rest upon more substantial grounds than are shown in the records of this case.

"For these reasons, I order the writ of habeas corpus to issue and that the petitioner be discharged thereon."

Judge Brewster's decision finds ample foundations in the decisions of the U. S. Circuit Courts of Appeal for various circuits including this one.

In *Ward v. Flynn, ex rel., Yee Gim Lung,* 74 Fed. (2d) 145 (1st Cir.) Circuit Judge Morton states very clearly the powers of courts in habeas corpus with regard to the decisions of Immigration Officials. The court says:

> The law on this subject is familiar, and it is unnecessary to cite authorities. Tribunals which undertake to ascertain facts must proceed on evidence or on the personal knowledge of their members. They have no other way of getting at the truth. Of course, they are not obliged to accept every statement which is sworn to or to disregard inherent improbability; tribunals of administrative character may get at the facts in any way they see fit within the bounds of reason and fairness. Where the proceedings are of a sort in which deception and fabrication are often attempted, a suspicious attitude towards them is not unreasonable. *But, to reject sworn, consistent, unimpeached, and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair-minded persons.* (Italics ours.)

Applying this rule, Judge Brewster concluded in the *Chin Ten Teung* case, *supra,* that the conclusion of the doctors as to the applicant's age based on their examination of the applicant and upon X-ray pictures was not such a reason as "would be regarded as adequate by fair-minded persons" to cause the rejection of "sworn, consistent, unimpeached, and uncontradicted testimony". Similarly in the present case we believe that the opinions of

witnesses who have not the slightest knowledge of the fact of birth should not cause the rejection of the testimony of credible eye-witnesses to that fact.

The principal reliance in appellant's brief is placed upon the recent case of *Hom Ark v. United States,* 105 Fed. (2d) 607 (C. C. A. 9th). Respondent is mistaken when he states that this decision "determines and controls all the issues involved in the instant case" as will appear from the following analysis of the *Hom Ark* case:

1. In the Hom Ark case the question of age became an issue for a materially different reason from that in the instant case. Under Section 1993 of the Revised Statutes, applicant there was required to show that he was born after the date on which his father took residence in the United States; to-wit: February 8, 1921. This for the reason that Hom Ark's father was not a native born citizen of the United States and it was necessary to go back to Hom Ark's grandfather to find such a native born citizen. In the instant case not only is applicant's father, Wong Quan, admittedly an American citizen but he is also a native born citizen and thus the provision of law which barred Hom Ark would not apply to him. It is merely necessary in the instant case to establish that applicant is the son of Wong Quan. Inasmuch as Wong Quan's wife was with him in the United States and accompanied him to China on the 1929 trip, it is entirely possible that conception occurred well before they arrived or even before they departed from the United States. The foregoing distinction between the instant case and the Hom Ark case is important as showing that much greater latitude may be allowed with respect to the date of applicant's birth than was possible in the Hom Ark case.

2. An essential distinction between the two cases arises through the lack of competent testimony in the Hom Ark case as to the date of birth. At page 608 of the opinion, the court says:

> "On this subject, appellant offered no testimony except that of himself and his alleged father, Hom Chuie. They both testified that appellant was born on February 22, 1921. What their testimony was based on, is not apparent. *It obviously was not based on personal knowledge.* Appellant, of course, could not actually know the exact date of his own birth. On the claimed date, February 22, 1921, Hom Chuie was in the United States. Therefore, he could not know that appellant—admittedly born in China—was born on that date." (Italics ours.)

By way of contrast with this total lack of competent testimony as to appellant's age in the Hom Ark case, we have in the instant case such competent and convincing testimony by eye-witnesses that the Board of Review in their memo dated November 2, 1939, is constrained to say: "The testimony is completely harmonious, no discrepancy of any sort being alleged." It is easy to understand why, in the Hom Ark case with no evidence fixing the date of birth except the rankest hearsay, that this Honorable Court could say at page 610,

> "X-ray pictures are not, of course, infallible means of determining age. No one claims that they are."

and yet conclude that opinion evidence of this type should prevail in a case where there is no direct evidence to offset it. However, when, as in the instant case there is positive and uncontradicted eye-witnesses' testimony as to the date of birth, opinion testimony of the doctors respecting age does not furnish a real reason to reject consistent and unim-

peached testimony which would be regarded as adequate by fair minded persons.

3. The age issue in the Hom Ark case was between 17 and 20 years, and the instant case involves a much younger child. Quoting from the Hom Ark case on page 609 it is said:

> "Q. Dr. King has stated in his letter * * * that he * * * examined an individual whose wrist bones were ossified although the child was but five years of age. Would that same be true at the advanced age of between 17 and 20? A. I don't think that would be a parallel at all. *That is an entirely different age period.*" (Italics ours.)

Much of the testimony quoted in the *Hom Ark* case serves to emphasize and support appellee's contention made at some length earlier in this brief, that conclusions based on X-ray pictures are a most unreliable method of determining age. Quoting from the *Hom Ark* case on page 609 it is said:

> "* * *, the following letter addressed to appellant's attorney and signed by Dr. C. V. King, roentgenologist of Los Angeles, California was put in evidence:
>
> "I have today examined some X-ray films of the right wrist and right elbow, at your request, which were taken of (appellant) on May 11th, 1938, by Dr. Albert Allen of San Pedro, California. * * *
>
> "These films both show a stage of development which should be expected in a person about 20 or 21 years of age. However, it must be borne in mind that the bones of some individuals develop more than usual and epiphyseal lines may be obliterated at an age several years sooner than expected. Such devel-

opment is not very unusual and, indeed, I have examined today another individual in whom there was no question of the age chronologically and yet the bones of the wrist were well ossified to the point commonly seen in a child at *least 7 or 8 years of age, although this child was only five years of age.*

"Accordingly, I feel that the evidence of the true age of the individual is not always conclusive and a variance of 5 to 6 years might be allowed in a person past the age of adolescence." (Italics ours.)

The variability and uncertainty of the testimony of the kind found in the present case to establish age is further seen in the conclusions reached by the doctors themselves. Dr. F. McLain Campbell concluded that applicant "is around the age of 10 years".

Dr. Harold M. Graning gives as his opinion (Exhibit "D") that applicant "is between 11 and 13 years." Dr. E. C. Kading states "in my opinion he is between 13 and 15 years of age." We thus find an amazing variation in the opinions rendered by the doctors themselves. Only Dr. Campbell suggests a definite age and the other two allow themselves a three year leeway. The estimates of all three medical men combined involves the amazing discrepancy of five years or approximately 50% of the subject's age. When there is such a great inconsistency in the affirmative testimony of these doctors, their opinions of the negative subject (namely that applicant is not of the age he testified to) is equally incredible.

The science of Roentgenology, so far as it applies to the determination of the skeletal age of an individual is simply a matter of averages, and is recognized by medical authorities as subject to great variations. Dr. Isidore

Cohn in his work "Normal Bones and Joints" has this to say:

> "It is interesting to note that up to the present time there is a marked variation noted regarding the time of ossification of certain of the epiphyses. The period of complete ossification probably is different under different climatic conditions; this also will give an opportunity for a study of this subject in the colder climates. The literature on the subject is misleading, there is no agreement among authorities as to the period at which union occurs, or the exact number of epiphyses."

To arrive at the averages upon which the doctors in this case have based their conclusion statistics were gathered covering a great number of cases. After tabulating these findings the averages are said to be the normal skeletal ages. In "Osseous Index of Skeletal Development" by Flory it is pointed out that the skeletal age varies greatly from the true or chronological age especially in children of the ninth and tenth years. In commenting on this variation the author says:

> "Individual variations appear in skeletal development with the same sort of characteristics as have been observed for other types of physical growth. The majority of children progress toward maturity in a rather regular fashion with few fluctuations, little deviation from the mean, and no atypical symptoms. This large group of average or near average children need very little adjustment of social prac-

tices to meet their needs. Extreme deviates and widely fluctuating individuals present a more serious problem. Some children mature early, others mature late, and still others move from the accelerated group to the retarded group or from the retarded group to the accelerated group. Most individuals reach skeletal maturity at some age. *Each individual has his own growth rate.*" (Italics ours.)

Even the height and weight tables relied on by the doctors are subject to great uncertainties. In "Pediatric Dietetics", *supra,* at page 435, it is said:

> "With so many factors creating disparity and militating against agreement in absolute weights, it becomes evident that there can be no definite rule as to what a child should weigh at any period of life. Nevertheless, measurements of hundreds of thousands of juveniles have established the average child to be within certain height and weight limits at different ages. This has led to the construction of a table which designates approximate heights and weights at given ages."

We have already seen that the applicant is extremely tall for his weight, it follows that he is also tall for his age. Skeletal age and height are more closely correlated than any other two factors; that correlation in the case of boys being .88 (page 20 of Osseous Development, etc., *supra*). This shows that if boy is extraordinarily tall for his chronological age, he will have a skeletal development that will be correspondently advanced for his age. This is the factor which has led the doctors to an erroneous con-

clusion of the applicant's age as based on the X-ray pictures.

Reference is made to the Radiographic Report, which is Exhibit "E" in the files. It states that the pisiform (a small bone in the wrist) is present and that the average age for its appearance is 10 years. However, the appearance of this bone has been noted in children of seven years or younger and ten years is merely the average. The conclusions of these doctors, therefore, are entirely discredited when it is observed their opinions are based on the normal or average development in boys. Everything in this record indicates that the applicant is not a normal or average case.

The fallacy will be made more apparent by a homely illustration. Suppose a father took his son into a store and asked for a "nine year old" suit. The clerk after trying vainly to fit the lad into the requested size, finally found that a "twelve year old" suit gave a fairly good fit. The clerk thereupon turned to the father and declared: "You lied to me! This boy is not nine years old, he is really twelve years old, I can prove it because his body fits into a 'twelve year old' size suit."

This Honorable Court expressed its strong disapproval of medical testimony to establish age in the case of *Woo Hoo v. White,* 243 Fed. 541. Opinion by Circuit Judge Gilbert. The court says:

> "The doubt expressed by the Commissioner General as to the alleged age of the applicant was based

upon a certificate of two surgeons that, after a careful consideration of the physical characteristics, they were of the opinion that 'his age is within one year either way of 23 years'. It is not represented that the certificate was based upon any scientific data, or otherwise than upon the general appearance of the applicant. Upon such a question the opinion of a surgeon is believed to be of no greater value than that of a layman, *and in either case it has but little probative value to show a difference of age of only two years.*" (Italics ours.)

The above case was cited with approval and followed by the District Court for the Northern District of California in *Ex Parte Gin Mun On,* 286 Fed. 752. In referring to the *Woo Hoo* case, *supra,* District Judge Dooling says:

"When the court lays down as a fact that such opinion has but little probative value to show a difference of age of only two years, it seems to me that is the first thing that should be submitted to a board of inquiry, who have to pass upon the weight of such testimony in the first instance."

The decision goes on to hold the action of the Immigration Board in that case to be unfair.

In *Fong On v. Day,* 39 Fed. (2d) 202, the court rejected a medical certificate offered as evidence of the fact that applicant was not less than sixteen years old, whereas, he claimed to be only twelve years of age.

It Constitutes Unfairness for the Immigration Department to Reject Sworn, Consistent and Uncontradicted Testimony Without a Real Reason Which Would Be Regarded as Adequate by Fair-Minded Persons.

Almost all of the Circuit Court of Appeals decisions we have examined involve an appeal by the applicant after his petition for writ of habeas corpus was denied by the District Court. An exception is the case of *Ex parte Chung Thet Poy,* 13 Fed. (2d) 262; in this case the District Court granted the writ and discharged applicant from custody. The case is similar to the one at bar in that the relationship of applicant to his father was the sole point in question. The court says:

> "It is difficult to perceive how any tribunal could fairly consider the evidence adduced in support of the applicant's claim, without being satisfied as to the claimed relationship to the father, unless the board was arbitrarily seeking to discover some grounds, however immaterial or unsubstantial, upon which it could base an excluding decision.
>
> "I think this is a case which warrants the court in assuming jurisdiction on the ground that the applicant was denied that fair hearing to which he may justly lay claim. While the court is without power to weigh the evidence, for the purpose of revising decisions of the administrative officials, it is not, I take it, powerless to act if the court is of the opinion that the decision of the administrators was wholly without warrant. Chin Hoy v. U. S. (C. C. A.) 293 F. 750; Lew Shee v. Nagle (C. C. A.) 7 F. (2d) 367; Christy v. Leong Don (C. C. A.) 5 F.

(2d) 135. See, also Kwock Jan Fat v. White, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010; Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938."

This decision was appealed by the Government and was later affirmed by the Circuit Court of Appeals for the First Circuit; *Johnson v. Chung Thet Poy,* 16 Fed. (2d) 1018. The Appellate Court says:

> "In the District Court it was found that the applicant was denied a fair hearing by the board; that it acted in an arbitrary manner in arriving at its excluding decision. We think the conclusion reached by the District Court was right and that the decree discharging the applicant should be affirmed."

In the instant case the Administrative Officers of the Immigration Department have rejected sworn, unimpeached and uncontradicted testimony without any reason which would be regarded as adequate by fair-minded persons. The courts have always held that when this condition exists the hearing accorded the applicant was unfair and he should be released on habeas corpus.

The general rule regarding finality of the decisions of the Immigration Department is subject to the exception that the hearing granted by the Department must be fair and that it constitutes unfairness for Administrative Officers to reject sworn, unimpeached and uncontradicted testimony without a reason which would be regarded as adequate by fair-minded persons.

In *Ward v. Flynn, ex rel., Yee Gim Lung,* 74 Fed. (2d) 145 (1st Cir.), Circuit Judge Morton states very clearly the powers of courts in habeas corpus with regard to the decisions of Immigration Officials. The court says:

> "The law on this subject is familiar, and it is unnecessary to cite authorities. Tribunals which undertake to ascertain facts must proceed on evidence or on the personal knowledge of their members. They have no other way of getting at the truth. Of course, they are not obliged to accept every statement which is sworn to or to disregard inherent improbability; tribunals of administrative character may get at the facts in any way they see fit within the bonds of reason and fairness. Where the proceedings are of a sort in which deception and fabrication are often attempted, a suspicious attitude towards them is not unreasonable. *But, to reject sworn, consistent, unimpeached, and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair-minded persons."* (Italics ours.)

A similar conclusion is reached by the court *In re Cheung Tung,* 292 Fed. 997, where a writ of habeas corpus was granted and it is held that a hearing is unfair where the Immigration Officers totally reject the direct and positive testimony of the petitioner and other witnesses because of a minor variance in the testimony. The court says:

> "For the officers to require more conclusive evidence than the petitioner has furnished is to demand proof beyond all doubt and to a moral certainty, and such a requirement would constitute a fundamental error in the application of the law. *In re Wong Toy* (D. C.), 278 Fed. 562."

In *Jew Yut Chew v. Tillinghast,* 25 Fed. (2d) 886, it is held that minor discrepancies in testimony of Chinese applicant's alleged father and brother were not grounds to cause his exclusion.

The Circuit Court of Appeals, First Circuit, has said in *Flynn ex rel. Yee Suey v. Ward,* 104 Fed. (2d) 900, that

> "The exclusion of Chinese cannot be justified merely because there are trivial and slight discrepancies in his proof nor an unjustifiable and arbitrary deduction from the evidence be made the basis for an order for exclusion. *That sort of procedure would demonstrate that the hearing was unfair."* (Italics ours.)

The recent and well considered decision of this Honorable Court, *Chun Kock Quon v. Proctor,* 92 Fed. (2d) 326, is important. In this case the Appellate Court reversed the decision of the District Court for the Western District of Washington which had denied the petitioner a writ of habeas corpus. After pointing out that the burden of proving citizenship is on the applicant, the court says:

> "A finding of the immigration authorities to the effect that an applicant is not a citizen *must have some factual support in the record.* Kwock Jan Fat v. White, 253 U. S. 454, 458, 40 S. Ct. 566, 567, 64 L. Ed. 1010. (Italics ours.)

"The fundamental principles controlling the deliberations and determination of the immigration officials and the Secretary in an exclusion case are held, in an opinion of Mr. Justice Hughes, to be 'the fundamental principles of justice embraced within the conception of due process of law.' Tang Tun v. Edsell, 223 U. S. 673, 682, 32 S. Ct. 359, 363, 56 L. Ed. 606.

"In a subsequent exclusion case, in an opinion by Mr. Justice Clarke, the Supreme Court said: 'The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power. * * * *It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.*' (Italics supplied by the Court.) Kwock Jan Fat v. White, 253 U. S. 454, 464, 40 S. Ct. 566, 569, 570, 64 L. Ed. 1010.

"This court has recently stated of the immigration officials in deportation cases: 'Their obligation as enforcers of the immigration laws is as mandatory

to establish citizenship, if it exist, as it is to deport the alien.' Lau Hu Yuen v. U. S. (C. C. A. 9) 85 F. (2d) 327, 331. * * *"

Conclusion.

Since the eye-witness testimony in favor of this applicant is of unimpeachable character and since there is ample support in the record for the finding of the District Court that the adverse medical testimony is uncertain and inconclusive, it follows that the decision of the lower court was correct and should be affirmed.

Respectfully submitted,

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